

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**RUSH TRUCKING, INC.,**

**Respondent.**

**Docket No. FMCSA-2006-25615<sup>1</sup>  
(Midwestern Service Center)**

**ORDER APPOINTING ADMINISTRATIVE LAW JUDGE**

**1. Background**

On May 17, 2006, the Michigan Division Administrator, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim to Respondent, Rush Trucking, Inc., proposing a civil penalty of \$192,500 for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Specifically, the Notice of Claim, which was based on a March 30, 2006, compliance review (CR), charged Respondent with: (a) 11 violations of 49 CFR 395.3(a)(2), with a proposed civil penalty of \$11,000 per count, for requiring or permitting a property-carrying commercial motor vehicle driver to drive after the end of the 14<sup>th</sup> hour after coming on duty; and (b) 130 violations of 49 CFR 395.8(e), with a proposed civil penalty of \$550 per count, for false reports of records of duty status.<sup>2</sup> Claimant alleged that this is the third enforcement case within six years for violations of 49 CFR Part 395, and that the previous two cases included admissions of Part 395 violations. As a result, the Division Administrator proposed the maximum civil

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<sup>1</sup> The prior case number of this matter was MI-2006-0215-US0868.

<sup>2</sup> See Plaintiff's Exhibit A to Claimant's Objections to Hearing.

penalty for each count pursuant to section 222 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA).<sup>3</sup>

On June 14, 2006, Respondent replied to the Notice of Claim, requesting a formal hearing. Respondent neither admitted nor denied the violations, stating that it was without sufficient knowledge or information to do so. Respondent noted that in accordance with 49 CFR 386.14(d)(1)(i), this statement has the effect of a denial. For its affirmative defenses, Respondent contended that, for each charge: (a) the information utilized does not support the charge or has been subject to a misinterpretation or misunderstanding of the documents reviewed; (b) the investigator may not be qualified to carry out the investigation from which the charge stems; (c) the investigator used Qualcomm data, which, Respondent maintained, may not be relied upon in the determination of a violation; and (d) Respondent is exempt from the claims in accordance with 49 CFR 395.8(2).<sup>4</sup>

On August 11, 2006, Claimant, the Field Administrator for the Midwestern Service Center, FMCSA, submitted his "Objections to Respondent's Request for Hearing" (Claimant's Objections to Hearing). In it, he disputed Respondent's affirmative defenses, arguing that: (a) the investigator who conducted the CR was an FMCSA Safety Investigator with considerable job experience and experience evaluating the documentation involved in this case; (b) the documentation has not been misinterpreted; (c) utilization of Qualcomm satellite positioning data was and is permitted under the circumstances presented by the CR of Respondent; (d) the use of the Qualcomm data

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<sup>3</sup> See "Field Administrator's Objections to Respondent's Request for Hearing" (Claimant's Objections to Hearing), note 1 at 3.

<sup>4</sup> There is no section 395.8(2). There are exemptions provided at section 395.1(e)(2).

fully addressed and satisfied Agency guidance requirements; and (e) Respondent is not exempt from the requirements of Part 395. Counsel for Claimant stated that the allegations of violations are supported by drivers' records of duty status, Respondent's Qualcomm vehicle positioning history reports, driver trip histories and trip sheets, refueling reports, shipping papers, and interviews with one or more representatives of Respondent.

By Order issued April 4, 2008, and served five days later, Claimant was given 30 days to either submit a Motion for Final Order or provide the status of the proceeding for the record. On May 7, 2008, Claimant stated that he expected to submit his Motion for Final Order on or before July 1, 2008; he did so on June 30, 2008. For each of the first 11 charges of the first alleged violation - requiring or permitting a property-carrying commercial motor vehicle driver to drive after the end of the 14<sup>th</sup> hour after coming on duty - Claimant submitted evidence consisting of Respondent's Qualcomm vehicle positioning history reports, the driver's trip history and trip sheet, a PC Miler depiction of the driver's route, and the declaration of the safety investigator (SI). For each of the 130 charges of the second alleged violation - false reports of records of duty status - Claimant submitted the driver's log, Respondent's Qualcomm vehicle positioning history reports, the driver's trip history and trip sheet, shipping papers, and the SI's declaration.

Claimant addressed Respondent's Reply by contending that the SI was fully qualified and experienced. He also maintained that the SI was justified in using Respondent's Qualcomm data because "the standard in place at the time of the March 2006 [CR] provided that GPS data [are] subject to review if the motor carrier uses the information in the normal course of reviewing RODS [records of duty status] for

accuracy.”<sup>5</sup> Claimant argued that “[t]he standard also provided that GPS based data and records may be utilized if the carrier’s own system is ineffective for verifying hours of service and the accuracy of driver RODS.”<sup>6</sup> Claimant did not provide a source for the standard, citing only the SI’s declaration as evidence of Respondent using the GPS data in reviewing RODS and as evidence that the Comdata fueling records used by Respondent were unreliable.<sup>7</sup> Claimant noted that a Uniform Fine Assessment (UFA) worksheet was not prepared because this was the third enforcement case for 49 CFR Part 395 violations within six years, for which section 222 of MCSIA mandates the automatic imposition of maximum civil penalties for each violation.

On August 11, 2008, Respondent submitted “Respondent Rush Trucking’s Request to Overrule Field Administrator’s Motion for Entry of Final Order and Memorandum of Support” (Respondent’s Answer to Claimant’s Motion for Final Order). Included in that submission was the Affidavit of Jeff Snyder, its Chief Operating Officer, who stated that, at the time of the CR, Respondent did not utilize Qualcomm to confirm the accuracy of driver RODS; instead it used Qualcomm to determine the location of freight. He further stated that, at the time of the CR, Respondent did not have the infrastructure in place to be able to utilize Qualcomm to determine compliance with driver RODS.<sup>8</sup> Respondent pointed to Part C of the CR report, in which the SI stated that most of the discovered 11-hour-rule violations “were not cited due to the difficulty in

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<sup>5</sup> See Field Administrator’s Motion for Entry of Final Order and Memorandum in Support (Claimant’s Motion for Final Order), at 13.

<sup>6</sup> See Claimant’s Motion for Final Order, at 14.

<sup>7</sup> See Exhibit C to Claimant’s Motion for Final Order, Declaration of Matthew Kinnucan, paragraphs 10 and 8, respectively.

<sup>8</sup> See Exhibit A to Respondent’s Answer to Claimant’s Motion for Final Order. The Affidavit was not signed; on August 13, 2008, Respondent submitted a signed copy of the Affidavit.

determining the actual amount of drive time when evaluating the Qualcomm reports.”<sup>9</sup>

Respondent, however, did not refer to the previous sentence of the CR report, in which the SI stated: “[A]mple evidence based on the Qualcomm reports found that the carrier’s drivers were routinely exceeding the 11 and 14-hour rules.”

## 2. Discussion

A Motion for Final Order is analogous to a motion for summary judgment. Therefore, the moving party bears the burden of clearly establishing that there is no genuine issue of material fact, and is entitled to a judgment as a matter of law.<sup>10</sup> All inferences must be drawn in favor of the non-moving party, Respondent in this case.

Even if Respondent fails to show any material facts in dispute, Claimant must establish a *prima facie* case. That is, unless Respondent admits or fails to deny having committed the violations as charged in the Notice of Claim, Claimant must present evidence clearly establishing all essential elements of the claim.<sup>11</sup> If Claimant makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, Claimant’s Motion for Final Order will be granted.<sup>12</sup>

Not only has Claimant not established a *prima facie* case, but Respondent has demonstrated that there are material facts in dispute. For example, in Part C of the CR report, it is not clear why the SI stated that violations of the 11-hour rule were not cited because of the difficulty in determining the actual amount of drive-time when evaluating Qualcomm reports, but did not express the same concerns for discovered violations of the

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<sup>9</sup> See Exhibit C-5, Part C, page 2 of 3, to Claimant’s Motion for Final Order.

<sup>10</sup> See *In re Forsyth Milk Hauling Co., Inc.*, FHWA Docket No. R3-90-037, 58 Fed. Reg. 16983, March 31, 1993 (Order, December 5, 1991).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

14-hour rule; indeed, although the SI provided a list of documents to support all of the charges in this case, it is clear that his primary supporting documents were the Qualcomm reports. Therefore, it is unclear why Qualcomm reports are supportive of alleged violations of the 14-hour rule, but not alleged violations of the 11-hour rule. Moreover, the parties dispute whether Respondent used GPS in the normal course of business in reviewing driver RODS. Finally, given a proposed civil penalty of almost \$200,000 based upon section 222 of MCSIA, a thorough, measured, review of the facts in this case by an administrative law judge is warranted. Therefore, Respondent's request for a hearing is granted, and Claimant's Motion for Final Order is denied; this matter is assigned to the Office of Hearings of the United States Department of Transportation.

### **3. Appointment of Administrative Law Judge**

An administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter in accordance with 49 CFR 386.54, and render a decision on all issues, including the civil penalty, if any, to be imposed. The proceeding shall be governed by subparts D and E of 49 CFR Part 386 of the Rules of Practice and all orders issued by the administrative law judge.

*It Is So Ordered.*

  
Rose A. McMurray

Assistant Administrator  
Federal Motor Carrier Safety Administration

7-10-09  
Date

**CERTIFICATE OF SERVICE**

This is to certify that on this 14 day of July, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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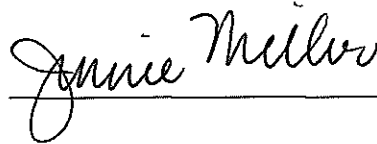
The Honorable Ronnie A. Yoder  
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A handwritten signature in cursive script, reading "Jennie Miller", is written over a horizontal line.